Supreme Court, U.S.
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No. 991586

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

KEVIN HOLT
LANCE CORPORAL
U.S. MARINE CORPS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the destruction of evidence by government agents violated the Due Process Clause of the Fifth Amendment, by denying the appellant the opportunity to examine all the evidence against him.

Whether the lower courts erred in ruling that government agents' destruction of the most crucial piece of evidence to convict appellant was harmless error, and waived by petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Lance Corporal Kevin Holt, United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App. A) is reported at 52 M.J. 173 (1999.) The decision of the United States Navy-Marine Corps Court of Criminal Appeals (App. B) is published at 46 M.J. 853 (1998.).

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on January 6, 2000. This Court's jurisdiction is invoked under 28 U.S.C. §1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be ... deprived of life, liberty or property, without due process of law ...

STATEMENT OF THE CASE

A. Proceedings below

A General Court-Martial, consisting of officer and enlisted members, convicted Petitioner, contrary to his pleas, of specifications alleging conspiracy to commit larceny, larceny and the murder of a fellow marine, Brent Arthurs. The Court-Martial sentenced Petitioner to life imprisonment, reduction to the grade of E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On Appeal to the Navy-Marine Corps Court of Criminal Appeals (*hereinafter* Navy Court,) Petitioner asserted eight separate legal and factual errors which he contended resulted in a trial which was tainted by fraud, and in an unjust verdict. By a published opinion which is

attached as Appendix "B," that court denied Petitioner any relief and Petitioner filed a Petition for Grant of Review with the Court of Appeals for the Armed Forces (C.A.A.F.). On June 22, 1998, the government filed a brief in opposition to Petitioner's petition. The C.A.A.F. granted Petitioner's Petition on four issues on 3 November 1998. On January 6, 2000, the Court of Appeals for the Armed Forces affirmed Petitioner's conviction. (Appendix A.) Petitioner filed a motion for reconsideration on 18 October 1999. On 6 January 2000, the C.A.A.F. denied Petitioner's motion for reconsideration. (Appendix C.)

B. The Facts

On May 11, 1992, the body of Corporal (*hereinafter* Cpl) Brent Arthurs was discovered in an area of Camp Pendleton, California, known as DeLuz Canyon Road. The Government contended at trial that Petitioner murdered Cpl Arthurs on the evening of May 8, 1992. Petitioner had an alibi for all but approximately 44 minutes of the evening of May 8, 1992. As Cpl Arthur's body was found some distance from where Petitioner was last seen, and as eleven defense witnesses testified to seeing Cpl Arthurs alive on May 9 or May 10, a time for which Petitioner had a clear alibi, the government sought some other way to tie Petitioner to Cpl Arthur's death.

The only physical evidence which allegedly tied Petitioner to this murder were pants which were seized from his home. Petitioner contended in the Courts below the pants were tampered with by Government experts. Petitioner submits, as he did at the courts below, said actions entitle him to a new trial.

On May 11, 1992, while on leave in his home state of Washington, Petitioner was arrested for the murder of Cpl Arthurs. Upon his arrest, Petitioner consented to the search of his mother's house, his grandmother's house, his father's house, and his truck. R. 1584-6. Petitioner's truck was searched two to three times, with negative results for any items of forensic value. R. 1956. Detectives Simica and Schwartz of the San Diego County Police department conducted the search.

In total, police seized 42 items from Petitioner for evidentiary analysis. R. 1955-60, 2208. All 42 items were subsequently sent to the United States Army Criminal Investigation Laboratory (USACIL,) at Fort Gillem, Georgia for forensic analysis. This laboratory is the premier forensics laboratory for the armed forces. R. 1959, 2208. None of the 42 items seized contained any forensic value, according to the USACIL report. R. 1959, 2208. The lack of forensic evidence, in and of itself, is remarkable, in light of the allegation Petitioner stabbed Cpl Arthurs some 46 times. The lack of blood in Petitioner's vehicle is significant, given testimony by government witnesses Petitioner was "covered with blood," (R. 828) and testimony by government agents at trial that Petitioner's pants had a large, visible blood stain in the crotch area. Furthermore, the government contended at trial that Petitioner drove from the scene of the murder to his barracks room.

One of the 42 items seized from Petitioner was a pair of Levi pants allegedly worn by Petitioner at the time of the murder. P.E. 9, R. 1079. These pants were initially examined by Deputy Schwartz when Petitioner consented to the search of his mother's home. Deputy Schwartz testified he visually examined the pants, and noticed nothing of evidentiary value. Deputy Schwartz then carefully searched

all four pockets, finding only a paper napkin in one of the pockets. R. 1955, 1959.

Upon receipt of the pants by the USACIL lab on May 19, 1992, the pants were examined by two laboratory veterans, Julius Brock, from the trace section, and Chief Warrant Officer 3 (*hereinafter* CWO3) Phillip Mills. The prosecutor specifically asked Mr. Mills to look for blood on the pants. R. 2209. After doing so, Mr. Mills testified he found no blood stains, obvious or discrete, on any of the 42 items seized from petitioner, including the seat cover and steering wheel of the automobile. Mr. Mills testified he visually inspected the pants for eleven minutes (R. 2210), and smelled them to determine if they had been freshly laundered, which they had not. R. 2217.

Mr. Mills then exposed the pants to an alternate light source to look for stains which were either hidden in the fabric, or invisible to the naked eye. R. 2210. Mr. Mills testified he had been using this method for ten years. R. 2212. Mr. Mills further testified that, prior to examining the pants, he turned the pants inside out, including the pockets. He subsequently checked them visually, and with the aforementioned alternate light source. Mr. Mills was absolutely certain there were no stains on the pants which were consistent with blood stains, and there was nothing whatsoever in the pant's pockets. R. 2216

The prosecution offered the pants into evidence, and they were received as Prosecution Exhibit (*hereinafter* P.E.) 9. At trial, Mr. Mills first noted there was now a large and obvious bloodstain in the crotch area, easily visible to the naked eye. R. 2218. He also noted that, when he conducted his initial examination of the jeans, this large, obvious, stain was not on them. R. 2219. Mr. Mills concluded by

testifying the jeans were "definitely" in a different condition than when he examined them in the USACIL Lab. R. 2247. The blood, which was so obvious at trial, was definitely **not** on the pants when he examined them, and several foreign objects which were later found in the pockets were not there when Mr. Mills examined the pants. R. 2247.

What is particularly noteworthy is not only Mr. Mill's testimony regarding the new found stain on the pants, but the complete inability of any witness to find blood on any other object with which Petitioner came into contact on the night he allegedly murdered Cpl Arthurs. For example, while government witnesses, using a substance known as Luminol, allegedly found blood in the Petitioner's pants pocket, there was absolutely no blood found on the steering wheel of Petitioner's automobile. This seems incredible in light of testimony that Petitioner was "covered in blood" after he allegedly murdered Cpl Arthurs, and that he had to drive his vehicle home after he allegedly killed Cpl Arthurs.

Government prosecutors, obviously unhappy with the results of Mr. Mill's testing, contacted numerous reputable laboratories in an attempt to have the pants re-examined. The F.B.I. , California State Crime Lab, and others refused to re-test the pants, because the USACIL lab had already done so. *See, United States v. Holt*, 52 M.J. at 178.

The Article 32(b) pre-trial investigation in this case was completed on 4 August, 1992. The case was referred to trial on 21 August 1992. In December 1992, Major Nunley, the Article 32 (b) Investigating Officer, attended a forensic evidence course in San Francisco. One of the guest speakers at that course was Rod Englert, a Sheriff's Deputy from Portland, Oregon, who made a presentation on blood splatter analysis. Major Nunley asked Mr. Englert if he would be

willing to re-test the jeans, who agreed to do so. Upon returning to Camp Pendleton, Major Nunley provided information about Mr. Englert to the trial counsel, who sent the jeans to Mr. Englert on 23 December 1992.

During the eight months from the time of Mr. Mills negative tests of the jeans, and Mr. Englert's observation of the now obvious blood stain, the pants were allegedly in storage at the Army lab. If this were true, however, one would have to question the freshly laundered smell which Mr. Englert noted at trial.

On 4 January, 1993, trial counsel advised the defense Mr. Englert found blood on the jeans. R. 1427. On 12 January, 1993, trial counsel further notified the defense Mr. Englert determined the blood to contain human antigens. On 13 January 1993, the defense sent the pants to its own expert for examination. R. 1445. On 15 January 1993, Mr. Englert testified for the government, over defense objection. R. 1427

Mr. Englert testified for many pages, basing his opinion almost exclusively upon his luminol testing of the jeans.[1] Luminol testing, according to Mr. Englert, is done when there are no stains visible to the naked eye. R. 1765. In the instant case, however, a stain **was** visible to the naked eye, at least at the time Mr. Englert examined the pants.

Mr. Englert then testified, based entirely on the luminol testing, that bloodstains on the pants were "consistent with a stabbing or other bloody event." R. 1534, 1776. Mr. Englert concluded his testimony by stating "... my findings are that those pants were in a close proximity to

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[1] *See*, footnote 2, opinion of Navy-Marine Corps Court.

the stabbing when it occurred." By Englert's own admission, "luminol luminesces with substances other than blood," and "the best way to tell" whether it is blood "is to perform confirmatory tests," which Mr. Englert did not do. R. 1534,5. Confirmatory tests are necessary because luminol is only a presumptive test for blood.

Following Mr. Englert's testimony, the government called Dr. Raymond Grimsbo, a forensic analyst. Perhaps most notable about Mr. Grimsbo's testimony is his statement that, when he received the pants from Mr. Englert, he found a dime and a piece of foil in gold foil in one pocket. He also observed what appeared to be a visible blood stain. R. 2170. Given Detective Schwartz's testimony that he saw no such stains, and CWO 3 Mill's statements that, not only did he see no such stains, but he also found nothing in the pockets, said testimony is remarkable.

REASONS FOR GRANTING THE PETITION

I. This case presents this Court with an opportunity to reconcile conflicts between lower federal courts on this Court's opinions in *California v. Trombetta*, and *Arizona v. Youngblood.*

II. This case presents this Court with an opportunity to determine the scope of the government's responsibility for evidence which is either lost or destroyed while in government possession.

There no longer appears to be a valid contention that government agents did not, in some way, tamper with the

evidence in this case, either intentionally or negligently. The Court of Appeals for the Armed Forces nearly conceded as much in their opinion, but chose to concentrate their opinion on Petitioner's alleged waiver of any such defect. *See Holt*, 52 M.J. at 185. The Court of Appeals seems to accept as fact that the jeans were tampered with, given their newly altered state at trial. As previously noted, the jeans produced at trial were dramatically different than those seized from Petitioner.

This Court has previously explored the issue of government destruction of evidence. Since then several District Courts and Courts of Appeal have addressed the issue, with varying results and rules of law.

In *California v. Trombetta*, 467 U.S. 479 (1984), this Court set out the rule by which appellate courts could determine the materiality of lost or destroyed evidence:

> "To meet the standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.*, 467 U.S. at 489.

Furthermore, in *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court extended the holding in *Trombetta* by stating that, if the exculpatory value of the evidence can not be determined, and all that can be determined is that the evidence was "potentially useful" for the defense, then a defendant must show that the government agents acted in bad faith by destroying the evidence. *United States v. Bohl*,

25 F.3d 904 (10th Cir. 1994), *citing Arizona v. Youngblood*, 488 U.S. 51.

In the instant case, the evidence in question was clearly exculpatory at the time Mr. Englert and Dr. Grimsbo conducted their tests. CWO 3 Mills testified when the jeans arrived at the USACIL Lab they, along with 41 other items seized from Petitioner, were devoid of evidentiary value to the prosecution. The lack of blood on **any** item seized from Petitioner would clearly tend to exculpate him. However, when the evidence was returned by Mr. Englert and Dr. Grimsbo, there was an obvious blood stain in the crotch area, and allegedly discrete human blood spots elsewhere on the jeans. Obviously, the exculpatory nature of the evidence had been destroyed by government agents.

Petitioner also satisfies the second prong of the *Trombetta* test. Obviously, Petitioner will not be able to obtain comparable exculpatory evidence by any other means. There was only one pair of jeans. The now "obvious" bloodstain will not go away, nor will the newly found discrete stains. Prior to the pants being adulterated by Mr. Englert, the exculpatory nature of the jeans was clear, and may well have vindicated Petitioner. Based on the actions of government agents, the inculpatory nature of the jeans is just as clear, and served to seal Petitioner's fate for a crime he did not commit.

This Court should apply the *Trombetta* test to this case, given the obviously exculpatory nature of the jeans when the police seized them from the Petitioner. As such, whether the jeans were intentionally altered by government agents, or somehow switched during the eight months they were in storage is irrelevant. However, even if this Court were, for some reason, to apply the more restrictive test of

Arizona v. Youngblood (by not concluding the pants were "potentially exculpatory") to this case, the result would seem to be the same. Admittedly, it is difficult for Petitioner to know exactly what happened to the jeans during their eight months in storage, inasmuch as they were completely under the control of government agents. However, assuming those at the Army lab did their job, the altering of the jeans must have occurred when they arrived at Mr. Englert's office. Petitioner also notes the government has resisted his numerous attempts to ascertain exactly what happened to the jeans.

It seems strained to argue these jeans were not "potentially exculpatory." As the only physical evidence allegedly linking Petitioner to this crime, if the jeans were devoid of evidentiary value (as they were at the Army lab,) their exculpatory nature seems clear.

Several federal courts have reviewed the issue of evidence destruction in light of this Court's holdings in *California v. Trombetta* and *Arizona v. Youngblood*, *supra*, with varying results and analysis. In *United States v. Bohl*, *supra*, the Court of Appeals for the Tenth Circuit concluded that a defendant invokes *Trombetta* when he demonstrates that the government destroyed evidence containing an "apparent" exculpatory value. *Bohl*, 25 F.3d at 910. In *Bohl*, the Court also looked at three factors to determine whether government agents acted in bad faith: Whether the government was placed on notice of the potentially exculpatory nature of the evidence, whether the defendant's claim is backed by independent evidence, and whether the government still had possession of the evidence when it was destroyed. *Id.*, 25 F.3d at 911.

In the instant case, Petitioner meets all three of these factors. Clearly the government knew of the potentially exculpatory of the jeans. In fact, as the Court of Appeals noted, the government was so concerned about the lack of blood on Petitioner's jeans that they tried, unsuccessfully, to have them examined by another laboratory. *United States v. Holt*, 52 M.J. at 178. Second, the defendant's claim is clearly backed by his own expert (as in *Bohl*,) who testified the jeans were devoid of evidentiary value when they were examined at the USACIL laboratory. R. 2247. Finally, the pants were under government control the entire time they were in storage. As such, the adulteration of the evidence could only have come from government agents.

In *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993), government agents destroyed a laboratory which was allegedly used to make methamphetamine. Finding the action of the government agents to be in bad faith, the Circuit Court upheld the District Court's dismissal of the indictment. While differing in its application of *Arizona v. Youngblood* from the *Bohl* Court, the Circuit Court still found bad faith on the part of government agents, owing to the obviously exculpatory nature of the laboratory, which the defendant claimed was used strictly for legitimate purposes. Like the *Bohl* Court, the *Cooper* court concluded the defendants would be unable to reconstruct the evidence for trial.

Petitioner submits his case warrants no less of a result. Clearly, he can not remanufacture the formerly pristine condition of the jeans, which have been forever destroyed. Contrary to the opinions of the Courts below, cross-examination of the government's experts is simply inadequate. Had the defense been able to present the jeans in their original unaltered state, and had the government not

been able to present the newly found blood stains on the jeans, Petitioner would likely have been acquitted. Petitioner has requested a DNA test on the jeans, in order to demonstrate his innocence (*See*, post-trial submission pursuant to Rule For Courts-Martial 1105). For reasons which are hard to fathom, the government has resisted all such requests.

In *United States v. Fletcher, et. al.*, 801 F.2d 1222, (10th Cir. 1986), the Court of Appeals for the Tenth Circuit reached an opposite conclusion from the courts in *Bohl* and *Cooper, supra.* In *Fletcher*, the police lost audio taped conversations between the defendant and police informants. Citing *California v. Trombetta, supra*, the Court held that "absent evidence of police or prosecutorial bad faith or misconduct, dismissal of an indictment is warranted only if the missing evidence possesses an exculpatory value that was apparent before the evidence was destroyed." *Fletcher*, 801 F. 2d at 1227. The Court never addressed this Court's holding in *Arizona v. Youngblood, supra.*

Even given this more restrictive view of the holding in *Trombetta*, Petitioner's case warrants reversal. As previously noted, the exculpatory nature of the evidence was clearly apparent before the pants were adulterated, as demonstrated by the government's dissatisfaction with the results from the Army lab. As also noted, Petitioner has tried to ascertain how the jeans were adulterated. To date, the government has blocked every such attempt.

The Court of Appeals erroneously concluded that, as Petitioner did not object to the admission of the jeans at trial, he affirmatively waived any issue as to their altered state. *United States v. Holt*, 52 M.J. at 185. This holding is completely contrary to the known facts in this case. As

previously noted, the altered condition of the jeans did not become apparent until after they were admitted into evidence, and after Mr. Englert performed his tests.

Even if this fact were untrue, however, the result should be the same. When dealing with an issue of such constitutional magnitude, this Court should conclude that the introduction of the jeans was plain error, regardless of any objection by the defense.

The effect of the destruction of the exculpatory nature of the jeans can not be overstated. Absent the jeans, there was no physical evidence linking petitioner to this heinous crime. Significant issues remain regarding the state of the evidence in this case. This Court should grant this petition, in order to clarify for lower federal courts the extent of government liability for lost or destroyed evidence.

CONCLUSION

Wherefore, the petition for a writ of certiori should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee v. Kevin M. HOLT, Lance Corporal U.S. Marine Corps, Appellant

No. 98-0037

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

52 M.J. 173; 1999 CAAF LEXIS 1278

May 13, 1999, Argued

September 30, 1999, Decided

PRIOR HISTORY:
Crim.App. No. 94-2003. Military Judge: M. L. Haiman.

DISPOSITION:
Decision of the United States Navy-Marine Corps Court of Criminal Appeals affirmed.

COUNSEL:
For Appellant: William E. Cassara (argued); Lieutenant Dale O. Harris, JAGC, USNR (on brief); Lieutenant Syed N. Ahmad, JAGC, USNR.

For Appellee: Lieutenant Kevin S. Rosenberg, JAGC, USNR (argued); Colonel Kevin M. Sandkuhler, USMC, and Commander Eugene E. Irvin, JAGC, USN (on brief); Commander D. H. Myers, JAGC, USN.

JUDGES: EFFRON, J., delivered the opinion of the Court, in which COX, C.J., and SULLIVAN, CRAWFORD, and GIERKE, JJ., joined.

OPINION BY:
EFFRON

OPINION:

Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of conspiracy to commit larceny; premeditated murder; and larceny (3 specifications), in violation of Articles 81, 118, and 121, Uniform Code of Military Justice, 10 USC §§ 881, 918, and 921, respectively. He was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Criminal Appeals affirmed. 46 M.J. 853 (1997).

On appellant's petition, we granted review of the following issues:

I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED AS A MATTER OF LAW WHEN IT RULED THAT, ALTHOUGH THE ARTICLE 32(b) INVESTIGATING OFFICER DEPARTED FROM HIS PERMISSIBLE ROLE BY ACQUIRING THE SINGLE MOST IMPORTANT PIECE OF EVIDENCE TO CONVICT APPELLANT, AND THEN TURNED THAT EVIDENCE OVER TO THE TRIAL COUNSEL, SAID ACTION BY THE INVESTIGATING OFFICER DID NOT PREJUDICE APPELLANT.

II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN IT REFUSED TO REMAND THIS CASE TO THE CONVENING AUTHORITY FOR A *DUBAY [17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967)]* HEARING, DESPITE EVIDENCE GOVERNMENT WITNESSES TAMPERED WITH THE MOST SIGNIFICANT PIECE OF EVIDENCE USED TO CONVICT APPELLANT.

III. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN IT RULED GOVERNMENT AGENTS HAD NOT VIOLATED THE RULE OF *UNITED STATES V. GARRIES, [22 M.J. 288 (CMA 1986)],* DESPITE THEIR DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE THROUGH LUMINOL TESTING WHICH DEGRADED OR DESTROYED SAID EVIDENCE.

IV. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING THE EVIDENCE LEGALLY SUFFICIENT TO PROVE APPELLANT GUILTY OF PREMEDITATED MURDER.

For the reasons discussed below, we affirm.

I. BACKGROUND

Part A summarizes the evidence and theories presented by the parties during the findings phase of the trial. Part B describes the identification, testing, and consideration at trial of the evidence that is the focus of Issues I, II, and III.

A. THE EVIDENCE AND THEORIES PRESENTED BY THE PARTIES ON FINDINGS

Appellant associated with a group of fellow Marines who shared a common interest in motorcycles. In March 1992, he

and his friends stole a trailer, which they later used to transport their bikes. Subsequently, military investigative authorities located the trailer at Camp Pendleton.

On May 4, 1992, investigators questioned one of the Marines, Private (Pvt) Jonathan Sprenger, about the trailer. When Pvt Sprenger told the authorities that he owned the trailer but could not find the keys or registration, they told him that he had one day to find the registration. Fearing imminent arrest, Pvt Sprenger absented himself from his unit and left the installation without authority. On May 11, Corporal (Cpl) Brent Arthurs, another member of the group who had participated in the trailer theft, was found stabbed to death in a remote area.

1. The Prosecution's Theory of the Case

At trial, the prosecution contended that appellant was agitated about the prospect that an investigation into the trailer theft would delay or cancel his eagerly sought reassignment to the State of Washington, his home state, and that it would affect his forthcoming marriage. According to the prosecution, appellant sought to preclude identification by encouraging Pvt Sprenger to flee the installation and assume a new identity before the investigators could question him further about the trailer. The prosecution further contended that when appellant learned of Cpl Arthurs' discussion with outsiders about the trailer theft, appellant murdered his fellow Marine in order to silence him.

To prove its case, the prosecution called over 3 dozen witnesses and offered nearly 5 dozen exhibits into evidence. Pvt Sprenger, who stated that he was a close personal friend of both appellant and Cpl Arthurs, testified that appellant and Cpl Arthurs had a strained relationship which "regressed" to

the point where "Lance Corporal Holt, after some time, didn't like Corporal Arthurs at all." According to Sprenger, both he and Arthurs were skilled motorcyclists, a trait not shared by appellant. Sprenger added that appellant "had a bad bike and no experience," and he resented being teased about these matters by others, particularly Cpl Arthurs.

After Pvt Sprenger, following appellant's suggestion, absented himself on Monday, May 4, appellant telephoned him several times. In those conversations, appellant expressed anger that Cpl Arthurs "had been running his mouth" about Pvt Sprenger's absence and the discovery of the trailer. Sprenger described appellant as becoming "violently mad" about Cpl Arthurs, asserting that appellant said: "He's got to shut up. He's running his mouth."

Pvt Sprenger's testimony was echoed by a number of appellant's friends and acquaintances. According to Arian Goucher, appellant had been worried about the trailer since April. When she and a friend raised the subject of the trailer, appellant "told us to be quiet about it, to shut our mouths; if we didn't, then he was going to shut them for us because this was not a joking matter." She added that "this was extremely serious . . . everybody could get in a lot of trouble for it if . . . it got out, and he was upset." In late April, appellant told Ms. Goucher that someone was talking about the trailer, that he knew who it was, and that he was "going to take care of it."

On Monday, May 4, appellant told Cpl Charles Sheldon that he was worried about the trailer and that he was concerned that Cpl Arthurs had been talking about it.

Two days later, appellant called Pvt Sprenger from the home of Holly Gallagher, who overheard appellant say that Arthurs "was talking" and was "running his mouth." While listening on an extension phone, Ms. Gallagher heard Pvt Sprenger respond: "He's talking; you got to shut him up. Cut

his throat out. Cut his tongue out. You have to shut him up." She also heard appellant tell Pvt Sprenger to stay in Huntington Beach and that he would "take care of" it. Ms. Gallagher, who had dated appellant since March, noted that in contrast to his normal telephone manner--relaxed, cool, and calm--he was pacing back and forth in anger.

Ms. Gallagher said that appellant continued to act in an unusual manner when she saw him on Thursday, May 7. She also observed that he was wearing a knife, which she never had seen him wear prior to the day before. That evening, appellant called Jennifer Bowman, and Ms. Gallagher heard appellant tell Ms. Bowman, "'If you're any friend of Brent's, you can warn Brent that I'm going to come after him.'"

The prosecution introduced evidence that appellant was seeking Cpl Arthurs on Friday, May 8, and that he found him. LCpl Sheldon and his wife, Shannon, had a conversation with Arthurs that evening in which Arthurs said that he knew that appellant was looking for him. Arthurs visited LCpl John Colvin late Friday afternoon in Colvin's barracks room, at which time Arthurs said that he knew appellant was looking for him, but he did not know why. Colvin told Arthurs that appellant "said that he had to get Arthurs to shut up," and Arthurs adamantly denied saying anything.

Arthurs and Colvin went to chow and returned to LCpl Colvin's room so Colvin could finish packing to go on leave. Appellant arrived at the room, and he and Arthurs talked. Appellant left after about 5 minutes. Colvin invited Arthurs to stay in his room while he was gone and told him that he could obtain access from appellant, who had a key to the room. That key was later found in a wallet on Cpl Arthurs' dead body. Cpl Corey Ridder, who said that he was a good friend of appellant but not a part of the motorcycle group,

saw a person matching Cpl Arthurs' physical description with appellant in appellant's room at about 7:00 p.m. on Friday evening.

Pvt Sprenger, who remained absent without leave and in hiding at Huntingon Beach, received several calls from appellant pertaining to Cpl Arthurs on Friday evening. In the first call, appellant said that he was with Cpl Arthurs. In the second, he mentioned Cpl Arthurs' motorcycle. In the third, which occurred sometime after midnight, appellant said that he had "just killed" Cpl Arthurs, that he had Cpl Arthurs' motorcycle, and that he was on his way to see Pvt Sprenger in Huntington Beach. At that point, Pvt Sprenger did not believe appellant's statement that he had killed Cpl Arthurs and taken his bike.

Appellant stopped by LCpl Sheldon's house about 1:00 a.m. on Saturday morning, May 9, and said that he had "just killed" Cpl Arthurs. When Sheldon shrugged it off in disbelief, appellant put his seabag on the floor and rolled it down to show Sheldon a pair of blood-stained jeans. As appellant departed, Sheldon heard the distinctive sound of Cpl Arthurs' motorcycle.

When appellant met Pvt Sprenger at Huntington Beach, he was riding Cpl Arthurs' bike and wearing Cpl Arthurs' leathers, helmet, and gloves. At that point Pvt Sprenger "knew something was wrong" because Cpl Arthurs never would have let anyone else wear his leathers or helmet and was "very protective of his motorcycle." Appellant proceeded to provide Pvt Sprenger with the details of how he had lured Cpl Arthurs to an isolated area and repeatedly stabbed him as he begged for his life. Pvt Sprenger testified that after appellant showed him the blood-stained jeans--

I asked him why, and he said that Brent needed to die, "He wouldn't shut his f***ing mouth." That was what he said. He said he was going to get us all in trouble, "He was going to get my orders canked," and we were all going to go to jail if he kept talking.

On Saturday morning, May 9, at about 6:00 a.m., appellant went to Cpl Ridder's room and told him that he had stabbed a person to death. When Ridder asked who he had killed, appellant stated that it was the same person that Ridder had seen him with the night before. Cpl Ridder's roommate, LCpl Henry Slack, Jr., was awakened by appellant's entry into the room and corroborated the details that appellant had related about the stabbing incident.

Later on Saturday, May 9, appellant visited LCpl Sheldon and his wife, Shannon. Appellant was accompanied by his fiancee, Ladona Knight, who had flown in from Boston. They were planning to travel to appellant's home in Washington State, where they would get married. Shannon, who had been told by Cpl Sheldon about appellant's statement that he had killed Cpl Arthurs, took appellant into a room away from the others and confronted him. At first, appellant denied killing Arthurs, but then acknowledged it and provided the details to Shannon.

On Sunday, May 10, appellant and his fiancee traveled with Pvt Sprenger to Washington State. Cpl Arthurs' body was discovered on Monday, May 11. At trial, the prosecution introduced evidence from civilian police investigators and others concerning the location of the body, probable time of death, and related matters.

The police investigators obtained statements implicating appellant and arrested him in Seattle, Washington, on Sunday, May 17. On that occasion, they seized a motorcycle that had been found at the Seattle airport and a helmet,

leathers, and boots from a garage at appellant's mother's home--all later identified as belonging to Cpl Arthurs. In addition, they seized a pair of jeans from the garage.

Various witnesses including members of appellant's family, described his use of the motorcycle while in Washington, as well as his possession of the leathers. At trial, Pvt Sprenger identified the seized pair of jeans as the same jeans appellant had shown him on Saturday, May 9, when appellant stated that he had killed Cpl Arthurs. After defense counsel obtained assurances from trial counsel and the military judge that the jeans could be subjected to further testing, the jeans were admitted into evidence without defense objection. The prosecution introduced expert testimony identifying stains on the jeans as human blood, although the stains could not be linked to Cpl Arthurs or any particular blood type. The prosecution also introduced expert testimony that the stain pattern was consistent with blood spatter caused by a knife. These matters are considered further in Part B, infra.

The prosecution evidence also included documents and testimony corroborating the statements of the Government's primary witnesses, as well as evidence in rebuttal of the defense theory, discussed below at (16-17), that Cpl Arthurs had given his motorcycle to appellant as part of an insurance-fraud scam.

2. The Defense Theory of the Case

The defense sought to convince the members of the court-martial that others involved in the trailer theft had both motive and opportunity to kill Cpl Arthurs; that Cpl Arthurs was seen alive after the time when appellant left the Camp Pendelton area for the State of Washington; and that Cpl Arthurs had given the motorcycle to appellant as part of an

insurance-fraud scheme in which he would falsely claim that it had been stolen.

The defense vigorously attacked the credibility of the prosecution witnesses through cross-examination and rebuttal testimony. Pvt Sprenger, who was described by the defense as "the cornerstone of the prosecution case," was depicted as a witness with "a biography that was littered in the past with criminal offenses, lies, deceptions, half-truths, and feigned lack of recollection." The defense painted a picture of Pvt Sprenger as a "man who calls himself a Marine [and who] has an insatiable appetite for two things: food and other people's property." The defense asked the court-martial panel to disregard the testimony of Pvt Sprenger, who not only was an accomplice in the trailer theft, but also testified under a grant of immunity.

The defense also focused on the credibility of the other four witnesses who testified that appellant had admitted killing Cpl Arthurs--Shannon Sheldon, LCpl Sheldon, Cpl Ridder, and LCpl Slack. The defense suggested motives to lie, the "overbearing . . . influence" of the prosecution, and inconsistencies between trial testimony and earlier statements to investigators and detectives.

The defense offered several witnesses who testified that they had seen Arthurs on Saturday, May 9, or Sunday, May 10--that is, after the time at which the prosecution witnesses testified that appellant had acknowledged killing Cpl Arthurs. The defense argued that this demonstrated that Arthurs could not have been killed Friday night, as the prosecution theorized, and that because appellant was on leave beginning on May 9, he had an alibi. Additionally, the defense offered witnesses who had seen appellant during the general time frame when the murder allegedly had occurred.

The defense also attacked the credibility of the autopsy and the scientific bases for ascertaining the time of death.

The defense challenged the prosecution's theory that Cpl Arthurs had been killed at the site in DeLuz Canyon Road where his body was found on May 11. The defense emphasized a lack of blood and minimal disturbance of vegetation at the scene, as well as an absence of signs of a struggle, for the purpose of demonstrating that the location was the site of a "dump job," not a murder.

Based on this theory, the defense elicited evidence tending to show that appellant could not have transported Cpl Arthurs' dead and bloody body in his automobile. This included evidence that the U.S. Army Criminal Investigation laboratory (USACIL) at Fort Gillem, Georgia, had found no trace of blood in appellant's vehicle or on a seized leather jacket.

With respect to the jeans which the prosecution asserted had been worn by appellant on the night Cpl Arthurs was murdered, the defense challenged the identification of the stains as coming from human blood as well as the proposition that it was the victim's blood. The defense sharply challenged the prosecution's expert witnesses as to their methodology, conclusions, and credibility. The defense emphasized that the initial visual testing of the pants at an Army crime laboratory had revealed no stains, no items in the pockets of the pants, and no signs of recent laundering; in contrast, the later testing had revealed stains, a coin and gold foil in the pocket, and the smell of recent laundering. Through cross-examination and its own witnesses, the defense challenged the personal and professional integrity of the prosecution's blood spatter expert; the credibility of the spatter testing technique that he had used and the conclusions

he drew from it; the effect of luminol testing on the spatters; and the probative value of the results of the luminol testing.

In addition to attacking the prosecution's evidence, the defense offered an explanation of appellant's possession of Cpl Arthurs' motorcycle. The defense introduced evidence that Cpl Arthurs had crashed his motorcycle in 1991 and that the insurance company had paid off the loan, freeing him to buy a new one. That new motorcycle, which came with one year of free insurance, also had been in several mishaps. Cpl Arthurs did not submit claims, however, because of concern about the potential impact on his free insurance. According to Cpl Dean Janssen, Cpl Arthurs told Pvt Sprenger around mid-March, that he hoped his motorcycle would be stolen, so he could get insurance money and buy a better bike, and that Pvt Sprenger had answered that he could make the necessary arrangements. The defense argued that Cpl Arthurs, pursuant to that plan, gave his motorcycle and leathers to appellant. The defense suggested that the murder was committed by Pvt Sprenger, and that Sprenger and the others had conspired to frame appellant.

B. TESTING OF THE JEANS FOR EVIDENCE CONCERNING THE DEATH OF CPL ARTHURS

On Sunday, May 17--6 days after the discovery of Cpl Arthurs' body--appellant was arrested while in Seattle on leave. During a consent search following the arrest, investigators seized a pair of jeans, which later was introduced into evidence without objection as prosecution exhibit 9. The jeans were transmitted, along with 41 other items, to the USACIL for examination. The testing revealed no signs of blood on the pants or any evidence of forensic significance on any of the items submitted to the laboratory. Although the Government sought reexamination by another

laboratory, these requests were refused on the basis that the USACIL already had undertaken the tests.

Charges against appellant, including murder, were referred for investigation under Article 32, UCMJ, *10 USC § 832,* and the investigation was completed on August 4, 1992. The investigating officer, Major N, recommended that the charges be referred to a general court-martial as a capital case. On August 21, the convening authority referred the charges for trial by general court-martial as a capital case. RCM 201(f)(1)(A)(iii), Manual for Courts-Martial, United States, 1984.[1]

The formal proceedings began on September 14, 1992, with a pretrial session under Article 39(a), UCMJ, *10 USC § 839*(a). After several continuances over 3 months, additional Article 39(a) sessions were held during the fall of 1992 to consider numerous defense motions, including jurisdictional challenges and challenges to various aspects of the pretrial investigation and referral procedures. This phase included a motion requesting a new Article 32 hearing which alleged that Major N was not an impartial investigating officer. The motion was based on the fact that Major N served as a prosecutor in unrelated cases, and cited certain aspects of his conduct of the investigation. The motion, which was denied and which has not been appealed, was based on actions that have not been challenged by appellant in the post-trial proceedings in this case.

Major N, who completed his duties as investigating officer in August 1992, attended a forensic evidence course in San Francisco during December that included a

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[1] All Manual provisions are cited to the version applicable at trial. The 1998 version is unchanged, unless otherwise indicated. See n.2, supra.

presentation on blood spatter analysis by a civilian law enforcement official, Rod Englert. Upon his return to Camp Pendleton, Major N had a conversation with trial counsel about the present case in which he described Mr. Englert's presentation and provided him with Mr. Englert's name and phone number. Final Brief at 6.

Appellant entered his pleas on December 22. Trial counsel sent the jeans to Mr. Englert for testing on December 23, 1992, and notified the defense of the testing on January 4, 1993. According to information developed later during trial, which is not in dispute, trial counsel advised defense counsel on January 4 that testing was performed by Mr. Englert, adding that luminol testing of the jeans had indicated blood stains, that the pattern of stains revealed blood spatter consistent with stabbing, and that further testing was proceeding to determine whether it was human blood.

The January 4 discussion between the parties was the first notice that the defense received about the retesting. The defense submitted no motions or objections at that time concerning the manner in which trial counsel had proceeded with respect to the testing of the jeans, nor did the defense submit any motions with respect to further testing of the jeans.

The last pretrial motion session was held on January 6, 1993. On January 7, voir dire and challenge proceedings were concluded, and both parties presented their opening statements. The following morning, the prosecution began presentation of its case on the merits, focusing on testimony concerning the trailer theft, the death of Cpl Arthurs, and the investigation into his death.

On January 12, trial counsel learned that the further testing had identified the stain on the jeans as human blood

and informed defense counsel of that result. The testing was performed by Dr. Raymond Grimsbo, a colleague of Mr. Englert. No motions or objections were made by the defense at this time, and the court-martial proceeded to consider the prosecution's evidence with respect to the events of the previous May.

The retesting of the jeans during December and January was first brought to the attention of the military judge at an Article 39(a) session on January 14. At that time, the defense described the prior testing of the jeans by the USACIL in July 1992 and noted that the defense had informed the USACIL that if the testing would destroy the samples, the defense wanted at least 50 percent of the samples saved for defense testing. See *United States v. Garries, 22 M.J. 288, 293* (CMA), cert. denied, *479 U.S. 985, 93 L. Ed. 2d 578, 107 S. Ct. 575 (1986).*

Defense counsel added that trial counsel had submitted the jeans for testing by Mr. Englert in December and that defense counsel had not learned of the testing until January 4, which meant that the defense had been unable--prior to testing by Mr. Englert--to submit a request under Garries to preserve a sample for defense testing.

After defense counsel completed his narrative, the military judge asked him to tell the court what relief he was requesting. Defense counsel replied that he was seeking suppression of the laboratory test results identifying the stains as human blood. Following further discussion of the basis for the request, the military judge summarized the defense position by observing that the defense had articulated two separate motions. The first motion was to exclude the laboratory results "based on lack of relevance" on the grounds that laboratory tests simply revealed the stains as containing human antigens, which did not prove

that the stains contained human blood or that the stains could be identified with any particular person. The second motion was based upon "a violation of the mechanics provided in Garries." Defense counsel agreed with the military judge's characterization of the defense position.

With respect to the first motion, concerning relevance, the military judge ruled that otherwise admissible evidence of a laboratory test identifying the stains as human blood would be relevant and that the probative value would substantially outweigh the danger of unfair prejudice. *See* Mil. R. Evid. 401, 402, and 403.

The second issue, concerning the *Garries* objection, involved the question of whether the blood-stain evidence had been fully consumed by the Government in testing before trial without safeguards to ensure an opportunity for independent defense testing or verification. See *Garries, supra 22 M.J. 288 at 293.* Trial counsel asserted: "I believe that there is sufficient sample remaining. I have been told that there is sufficient sample remaining for additional testing." Defense counsel indicated that they were "in the process of getting our own independent expert to make certain that that is in fact the truth," but that in their "brief conversation" with their expert, they "were informed that luminol destroys the ability to accurately get in and reanalyze it. . . ." Trial counsel argued that the Government's expert "categorically disagrees with that."

After the parties concluded their presentation on the Garries issue, the military judge noted that the defense concern was premature:

Then we have nothing to talk about yet, have we, until a factual determination is made as to whether or not there's even a problem under Garries. If both sides agree with me

that if sufficient blood remains--notwithstanding the application of the luminol--to render a test, then while the Government might have proceeded differently, you know, no harm, no foul; and if you can have your analysis, if it comes back differently from theirs, you've got a fight. If it comes back the same as theirs, you can go another way; but in either event, if there's enough of a blood sample left for analysis, Garries doesn't walk into this courtroom. Am I right?

The defense agreed.

The military judge then made clear that he was leaving the matter open, pending development of further information:

MJ: What I'm saying to you is I don't have to decide this now.

IMC: I would agree.

MJ: And I won't.

Defense counsel indicated that they would have an answer from their expert within 24 hours as to whether the luminol testing had destroyed the sample and prevented further testing for blood.

After a brief recess, assistant trial counsel revealed that he had called the defense expert and asked her specifically whether luminol would destroy the proteins in a sample and prohibit further testing for blood. Her response, according to assistant trial counsel, was that luminol may dilute the sample but does not destroy the proteins [for] further testing. Defense counsel answered:

That's consistent with what I've told the court. She's saying it may or may not. Okay. I just wanted to make the court clear that I wasn't--I'm still accurate on that. That's what she said. She's going to have to see it. Okay.

Counsel for the parties and the military judge then addressed the issue of how to proceed while awaiting the defense expert's report on the testing issue. Mr. Englert, the prosecution's spatter expert, was already on his way to the trial, but Dr. Grimsbo, whose tests identified the stains as human blood, was scheduled to arrive at a later date. The military judge obtained an assurance from trial counsel that Mr. Englert would testify only that the spatter pattern was consistent with blood and would not testify that it was, in fact, blood. Based upon that assurance, the military judge proposed that the prosecution proceed with Mr. Englert's testimony and that Dr. Grimsbo's travel be held in abeyance. After the military judge advised the defense that he would consider the possibility of later recalling Mr. Englert for further cross-examination if so requested by the defense, the defense offered no objection to proceeding with Mr. Englert's testimony.

Mr. Englert testified on January 14. He was qualified and accepted by the court as an expert witness in blood spatter and luminol testing with no objection by the defense. Mr. Englert discussed the basics of blood-spatter analysis and luminol testing, described the spatter pattern on the jeans in the present case as consistent with a stabbing, and stated that a stain in the right front pocket was consistent with placing a bloody hand in the pocket. There was no defense objection to the substance of Mr. Englert's testimony. At the conclusion of direct examination, defense counsel asked to defer cross-examination until the following week. Notwithstanding a prosecution objection, the military judge granted that request.

On January 20, Mr. Englert returned to the courtroom, where he was subjected to vigorous cross-examination. After noting that the jeans had been subjected to luminol tests on three separate occasions, he acknowledged that such testing could dilute and change the pattern. Also, he agreed that there were several possible explanations for the stains other than stabbing, that luminol reacted with materials other the blood, and that there was no way to determine the age of the stains. He reflected disagreement with statements or theories propounded in leading treatises and texts on blood-spatter analysis and the effects on luminol testing from such things as laundering. He was unable to utilize an equation used to determine the angle of a drop of blood, and he was unable to identify the causes of a variety of spatters that had been prepared by the defense. The defense also brought out through cross-examination matters relating to his character and reputation as an analyst. This material was used by the defense to attack his credibility before the court members. It did not form the basis, however, for an objection to admissibility of his testimony as a matter of law.

On January 21, after completing Mr. Englert's testimony and hearing from several other witnesses, the parties returned to the Garries issue in an Article 39(a) session. Trial counsel indicated that Dr. Grimsbo was available to travel to Camp Pendleton and testify on January 22 concerning identification of the stain as blood, depending on the defense intention with respect to the Garries issue. Defense counsel indicated that his expert was still awaiting raw data from Dr. Grimsbo in order to complete her work on the jeans, and the matter was left unresolved. In a further Article 39(a) session later in the day, the following colloquy occurred:

TC: Sir, finally, there is still an inchoate *Garries* motion on the Government's witness that's flying in from Portland. I believe that *Garries* has been completely complied with and that even if there could not be an additional retest, it should still--his testimony should still be admissible and be received into evidence.

MJ: Does the defense wish to pursue the motion?

IMC: Based on our limited contact--and again, I've been in telephonic contact--it does not look--in other words, okay, rather than getting into detail, it does not look like we have a righteous *Garries* motion at this point in time.

MJ: Very well. If your opinion changes, of course you have leave to make it at any pertinent point.

IMC: Fine. Okay.

Dr. Grimsbo took the stand the next morning. The defense offered no objections or motions relating to admissibility of his testimony based on his qualifications as an expert, the scientific validity of his testing procedures, or any Garries discovery issues.

Dr. Grimsbo testified that Mr. Englert brought the jeans to his lab on December 28, 1992, and that he began his examination of them on January 4, 1993. At the outset, he noted that the jeans had an air of fresh laundering. In the right front pocket, he discovered a dime and a piece of gold foil, probably from a breath mint, that "had gone through a laundering process and got all wadded up there." Additionally, he noted "numerous light brown stains" on the jeans that were visible without enhancement.

After describing the testing that he performed on the jeans at Mr. Englert's request, he opined that the stains were

human blood. Further testing to determine type or possible source of the blood, however, was unsuccessful for any of several possible reasons, such as chemical degradation due to natural causes.

On cross-examination, Dr. Grimsbo maintained that luminescence generally does not degrade the material and, on garments like cloth, only rarely alters the size and shape of bloodstains. He acknowledged that washing can change the size and shape of a blood stain and reduce the number of stains. He testified that he had no idea whose blood was on the jeans, how long the bloodstains had been on the jeans, or how many times the jeans had been washed after they had been stained with the blood. He also testified that while the pattern was consistent with "castoff" from a stabbing motion, he would not say that it was any more consistent with a stabbing than with "any other innocent activity."

During its case-in-chief, the defense called Chief Warrant Officer-3 Mills as a witness. Mr. Mills, a forensic chemist at the USACIL, had participated in the initial examination of appellant's jeans and 41 other pieces of evidence in connection with this case, along with another laboratory official. He described the procedures he used in detail. He explained that he had not used luminol testing because it reacted with substances other than blood. He also noted concern that luminol can have a "destructive effect on bloodstains," including changing the size and shape of patterns of individual spots and the number of spots. He noted that the potential for alteration of the evidence created potential problems under the laboratory's Garries policy of saving half of a sample, so the lab had shifted away from luminol testing to other methods. He acknowledged, however, that luminol testing could reveal the presence of

blood under some circumstances where the other tests used by the laboratory could not do so.

Mills noted that after doing a visual screening and an examination using an alternate light source, he detected no bloodstains on the jeans or on any other item submitted for examination. He further stated that the stains visible on the jeans at the time of trial were not present on the jeans at the time he examined them at the Army laboratory. He also said he was "very certain" that there were no coins or pieces of gold foil in any of the pockets and that the jeans did not have the smell of being freshly laundered. It was his view that the stain patterns could not be interpreted as being consistent with a stabbing.

Two other expert witnesses testified for the defense in connection with the retesting of the jeans and related matters. Parker Bell--a criminalist, consultant, and attorney in private practice--offered testimony contrary to Mr. Englert's views. He had prepared a set of stains that the defense earlier had used to test Mr. Englert's testimony. He used them to explain to the members that a stain that might appear at first glance to have been made in a certain way and under certain circumstances actually might well have been made in a different manner. He also testified that a trigonometric formula for figuring angularity, which Mr. Englert had stated was obsolete, was "still a scientifically accepted way of determining angle of impact." Using photographs to illustrate his testimony, he testified that washing and laundering could lead to differing interpretations as to the cause of a stain. He also expressed disagreement with Mr. Englert's method for interpreting the velocity and pattern of blood spatters, and described substances other than blood that could cause positive reactions in luminol testing. In addition, he disagreed with Mr. Englert's assessment of the blood spatters

and stated that it was not possible to testify that the stains were any more consistent with stabbing than with other activity.

The other defense expert witness was Ms. Carol Hunter, a criminologist, who conducted further testing on the jeans for the defense following the tests conducted Mr. Englert and Dr. Grimsbo. She found both positive and negative results on the areas identified as positive by Mr. Englert and Dr. Grimsbo, as well as false positives on various control samples. As a result, she concluded that the positive stains were inconclusive for human blood.

On cross-examination by the prosecution, Ms. Hunter acknowledged that she could not say whether the positive results did or did not indicate the presence of human blood. She acknowledged that she did not use the Takayama confirmatory test, which Dr. Grimsbo had performed, and she agreed that a positive Takayama test probably would convince her that the stain was human blood. Ms. Hunter gave no indication that she lacked sufficient samples to conduct testing on behalf of the defense.

During both cross-examination and in its case-in-chief, defense counsel vigorously questioned the Government's scientific evidence. The defense, in its closing statement, specifically challenged the credibility of the Government's case. The defense strategy clearly was to use the cross-examination of Mr. Englert and Dr. Grimsbo, and its direct examination of Mr. Mills, Mr. Bell, and Ms. Hunter, in an effort to raise a reasonable doubt in the minds of members of the court-martial panel. The testimony elicited by the defense, however, was not cited or relied upon for the purpose of disqualifying Mr. Englert or Dr. Grimsbo as experts as a matter of law, or as grounds for precluding admissibility of their testimony.

II. DISCUSSION

A. CONDUCT OF THE INVESTIGATING OFFICER

Appellant has asked that his conviction be set aside and that the case be remanded for a rehearing on the grounds that the investigating officer acted improperly in providing information about Mr. Englert and his testing procedures to trial counsel after the case had been referred to trial. The defense became aware of the retesting during trial but did not learn of the investigating officer's communication to trial counsel until after trial.

Before charges may be referred to a general court-martial, there must be a "thorough and impartial investigation" under Article 32(a), UCMJ, 10 USC § 832 (a). We have referred to an Article 32 investigation as a "judicial proceeding," *United States v. Bell,* 44 M.J. 403, 406 (1996), in which ex parte communications between the investigating officer and the prosecution are improper. *United States v. Argo,* 46 M.J. 454, 458 (1997), citing *United States v. Payne,* 3 M.J. 354 (CMA 1977).[2]

The investigating officer is required to "inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges." RCM 405(e).[3] The investigating officer must

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[2] Although the Article 32 officer does not preside over an adversarial proceeding leading to an adjudication of guilt or innocence, the requirement for impartiality means that the investigative and advisory functions of the Article 32 officer must be performed, insofar as practicable, by a person possessing the impartiality similar to that required of a military judge. See *United States v. Reynolds,* 24 M.J. 261, 263 (CMA 1987).

[3] The 1998 version of this provision is different from the version applicable in this case, but this statement is the same.

submit a report to the commander who ordered the investigation, and the "commander shall promptly cause a copy of the report to be delivered to each accused." RCM 405(j)(3). "The investigating officer is disqualified" from acting subsequently "in the same case in any other capacity." RCM 405(d)(1).

These considerations envision an investigation that results in an impartial report containing a recommendation for use by the command. The accused has a right to a copy of the report. The court below concluded that the actions of Major N were inconsistent with the requirements of Article 32 and RCM 405: "Provision of information solely to the assigned prosecutor, with no simultaneous, or even serial, notification to the defense, makes the act appear, at least, as one of an impermissible, adjunct trial counsel." 46 M.J. at 862 (emphasis in original). We agree that the actions of the investigating officer may have created at least the appearance of impropriety by providing trial counsel with what was, in effect, a supplementary report that was neither transmitted to the commander who ordered the investigation nor served on the accused.[4]

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[4] In view of the unique facts of this case--an ex parte post-referral communication to the trial counsel--we decline to speculate as to the circumstances, if any, in which it would be appropriate for an investigating officer to provide an unrequested supplementary recommendation to the command. At a minimum, however, any such communication must be reported promptly to the command and to the accused. If the trial counsel or the staff judge advocate becomes aware of a communication by the investigating officer about the case to the command, the prosecution, or government investigators after the investigating officer's report has been submitted, the substance of the communication shall be reported promptly to the commander who ordered the investigation and the accused. If such a matter arises after referral, the information

Depending on the context, such an improper post-referral communication may raise two different issues, involving two distinct forms of relief. If the communication supports a claim of bias in the conduct of the Article 32 investigation, an appellant may request that the case be remanded for a new investigation based on denial of the right to an impartial Article 32 proceeding. Second, if the communication supports a claim that the investigating officer improperly served in a prohibited role, such as trial counsel, an appellant may request a new trial if there has been prejudicial error.

In the present appeal, appellant has not claimed that a new Article 32 investigation is required on the ground that the investigating officer's action demonstrated bias in the conduct of the investigation. See *Payne,* 3 M.J. at 357. Accordingly, the sole question before us with respect to the granted issue is whether the improper communication from the investigating officer led to prejudicial error at trial.[5]

Major N's role consisted of providing a suggestion to trial counsel as to the possibility of using an individual as a potential witness and to test certain evidence. Major N did not exercise any form of prosecutorial discretion or make any tactical or strategic decisions with respect to the conduct

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shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.

[5] For purposes of the present appeal, we shall assume, without deciding, that the communication from Major N to trial counsel had the effect of making Major N a de facto member of the prosecution.

of the trial. The decisions with respect to testing the jeans, timing of information provided to the defense, and presentation of testimony by Mr. Englert and Dr. Grimsbo were made by trial counsel, not by Major N.

The fact that the investigating officer provided information about this form of testing to trial counsel does not demonstrate that the improper communication led to prejudicial error at trial. All pertinent actions were taken by trial counsel and were known by defense counsel at the time of trial. The legal issues surrounding the value of the jeans and related evidence involved the qualifications of Mr. Englert and Dr. Grimsbo as expert witnesses, admissibility of their testimony, and the possibility of a Garries violation. Either Mr. Englert and Dr. Grimsbo were experts, or they were not. Either their testimony was relevant and admissible, or it was not. Either there was a valid objection under Garries, or there was not. Information concerning the role of Major N in suggesting the possibility of such testing to trial counsel would not have made a substantive difference as to the propriety of the military judge's rulings on any of these issues. Accordingly, we conclude that the role of Major N did not result in prejudicial error during the trial proceedings. *United States v. Jennings*, 49 M.J. 549, 551-52 (C.G.Ct. Crim.App. 1998); *cf. Wright v. United States,* 2 M.J. 9, 10-11 (CMA 1976).

It is also noteworthy in this regard that when appellant described the investigating officer's role in these matters in two separate post-trial submissions to the convening authority under RCM 1105--including a submission filed by new counsel retained specifically to focus on the post-trial action--the post-trial submissions simply took note of the discussions between Major N and trial counsel in the course of providing a narrative description of the events leading to the testing of the jeans by Mr. Englert and Dr. Grimsbo.

Neither of appellant's post-trial submissions set forth an objection with respect to the role for purposes of impugning the fairness of the Article 32 investigation or the fairness of the trial itself. Although we do not regard appellant's post-trial submissions as waiving further appellate review of issues concerning the investigating officer's role, these submissions underscore the lack of prejudice.

B. EVIDENCE TAMPERING

In the second granted issue, appellant contends that the jeans may have been tampered with prior to their introduction into evidence and that we should order an inquiry into that possibility. He points to evidence introduced at trial indicating that the jeans, when seized from appellant and when tested in the USACIL, contained no visible blood stains, did not smell freshly laundered, and had nothing in their pockets. He argues that this evidence should be contrasted with evidence that the jeans given to Mr. Englert for testing and that were admitted into evidence at trial had numerous visible stains, smelled freshly laundered, and had items in their pockets.

The evidentiary value of the jeans was vigorously contested by the defense at trial through close cross-examination of prosecution witnesses and presentation of defense evidence--including evidence suggesting possible tampering. Appellant, however, chose to raise these matters for consideration by the court-martial panel for purposes of suggesting that they should find appellant not guilty of the charges. Appellant did not move to preclude introduction of the jeans based on possible tampering, and he made no motion or objection regarding the authenticity of the jeans or their admissibility as evidence. Because these issues were raised for consideration by the court-martial panel on the

issue of guilt or innocence, rather than before the military judge as a matter of admissibility, the weight to be given such evidence was a matter for the members. In that context, the questions raised by appellant do not provide a basis for finding prejudicial error at trial. See Mil. R. Evid. 103, Manual, *supra*.

C. THE OPPORTUNITY FOR DEFENSE TESTING OF THE EVIDENCE

In the third granted issue, appellant contends that the luminol testing of the jeans by Mr. Englert and Dr. Grimsbo resulted in "destruction" of "potentially exculpatory evidence" that was of such a nature that he could not obtain comparable evidence by other reasonably available means. See *California v. Trombetta,* 467 U.S. 479, 487, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984); *United States v. Kern,* 22 M.J. 49, 51 (CMA 1986). He contends that this testing, which was done without first informing the defense and permitting the defense an opportunity to have a representative present, destroyed the exculpatory value of the pants and thereby denied him equal access to the evidence, in violation of Article 46, UCMJ, 10 USC § 846. See *Garries,* 22 M.J. at 293 and n.6 (in view of Article 46, "the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present"). Accord *United States v. Mobley*, 31 M.J. 273, 277-78 (CMA 1990). We conclude, however, that appellant did not preserve his objection for appellate review. See Mil. R. Evid. 103.

As noted in section I.B., supra, the defense initially raised the issue before the military judge on January 14, 1993, through a motion to suppress all results of the retesting, including Englert's and Grimsbo's testimony,

suggesting "no compliance with *Garries*." Trial counsel contested the charge of a *Garries* violation, contending that there was enough sample left for defense testing. The defense acknowledged that they had not received a definitive response from their expert as to whether there was any problem in conducting further tests. Accordingly, the military judge reserved his ruling until the defense expert could determine whether "there's enough of a blood sample left for analysis."

The only subsequent mention of the matter came a week later when trial counsel reminded the military judge of the "inchoate *Garries* motion." Defense counsel at that point stated on the record: "Based on our limited contact [with the defense expert] . . . it does not look like we have a righteous *Garries* motion at this point in time."

Although the military judge invited the defense to pursue the *Garries* issue later if they wished, the defense did not pursue the military judge's invitation to seek a ruling on the *Garries* issue. The defense approach, in this regard, is understandable in light of the testimony of the defense expert witness, Ms. Hunter, who had examined the jeans subsequent to the tests performed by Mr. Englert and Dr. Grimsbo. Her testimony did not reflect an impairment, as a result of the prior testing, with respect to her tests. Although her testimony challenged the results presented by the government experts, she did not assert that the testing previously done by them affected her ability to obtain results from her own tests. If the ability to test had been affected adversely, the defense had ample opportunity to elicit information from her or to introduce other testimony to demonstrate that the Government's testing had so degraded the sample as to hinder such testing. Instead, her extensive and detailed testimony regarding the numerous tests that she

ran, if anything, implied that she was not restricted in her testing by the nature or quality of the samples.

Appellant, who had ample opportunity at trial to introduce evidence of a *Garries* violation and to obtain a ruling from the military judge, chose not to do so. As a result, appellant has waived our consideration of this issue. See Mil. R. Evid. 103.

D. SUFFICIENCY OF THE EVIDENCE

Finally, appellant asserts that the evidence is legally insufficient to support the findings. In support of this contention, appellant has provided a lengthy discussion of the evidence that amounts to an invitation to reweigh the evidence and reevaluate credibility. Such consideration of the factual sufficiency of the evidence is outside the statutory parameters of our review. Compare Art. 66(c), UCMJ, 10 USC § 867(c) (1994), with Art. 67(c), UCMJ, 10 USC § 867(c) (1994). As a matter of law, the question of legal sufficiency requires us to consider the evidence in the light most favorable to the Government, and to determine whether the evidence provides a sufficient basis upon which rational factfinders could find all the essential elements beyond a reasonable doubt. See *Jackson v. Virginia,* 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). The evidence, as summarized in Part I, is more than sufficient to meet that standard.

III. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES v. Kevin M. HOLT, 519 06 3308 Lance Corporal (E-3), U.S. Marine Corps

NMCM 94 02003

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

46 M.J. 853; 1997 CCA LEXIS 195

June 17, 1997, Decided

PRIOR HISTORY:
Sentence adjudged 23 June 1994. Military Judge: M.L. Haiman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, Marine Corps Air Station El Toro, Santa Ana, CA.

DISPOSITION:
Affirmed.

COUNSEL:
DAN R. HYATT, Civilian Defense Counsel.

LT SYED N. AHMAD, JAGC, USNR, Appellate Defense Counsel.

LT DAVID M. HARRISON, JAGC, USNR, Appellate Government Counsel.

JUDGES:

BEFORE P.J. McLAUGHLIN, K.T. SEFTON, LARRY D. WYNNE. Senior Judge McLAUGHLIN and Judge WYNNE concur.

OPINION BY:
K.T. SEFTON

OPINION:

SEFTON, Judge:

Appellant was convicted, contrary to his pleas, by a court consisting of officer and enlisted members, of conspiracy to commit larceny, premeditated murder in the stabbing death of a fellow Marine, Corporal Brent Arthurs; and larceny of a trailer, motorcycle, and various motorcycling apparel in violation of Articles 81, 118, and 121, Uniform Code of Military Justice, 10 U.S.C. § § 881 918, and 921 (1994) [hereinafter UCMJ]. Referred as a capital-murder case, the trial proceedings spanned the period between 14 September 1992 and 17 March 1993. Appellant was represented by both individual military counsel and detailed counsel at all sessions of the trial. Each of appellant's counsel professionally represented him throughout the proceeding. Following a hard-fought trial on the merits, appellant was convicted as charged, and sentenced to a dishonorable discharge, reduction to pay grade E-1, forfeiture of all pay and allowances, and confinement for life. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the eight assignments of error,[6] the Government's response thereto, and appellant's

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[6] I. EVIDENCE OF LUMINOL TESTING OF APPELLANT'S PANTS WAS ERRONEOUSLY ADMITTED AGAINST APPELLANT WHERE SUCH EVIDENCE DID NOT COMPLY WITH *DAUBERT V. MERRELL DOW PHARM. CO.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)

II. EVIDENCE OF LUMINOL TESTING OF APPELLANT'S PANTS WAS ERRONEOUSLY ADMITTED AGAINST APPELLANT WHERE THE PREJUDICIAL EFFECT OF SUCH EVIDENCE FAR OUTWEIGHED ANY PROBATIVE VALUE. (Citation omitted)

III. EVIDENCE THAT APPELLANT'S PANTS CONTAINED HUMAN BLOOD WAS ERRONEOUSLY ADMITTED AGAINST APPELLANT WHERE THERE WAS NO CONNECTION SHOWN BETWEEN THE BLOOD ON THE PANTS AND APPELLANT OR THE VICTIM. (Citation omitted.)

IV. APPELLANT WAS DENIED CONSTITUTIONAL DUE PROCESS OF LAW WHERE GOVERNMENT AGENTS DESTROYED THE POTENTIALLY EXCULPATORY VALUE OF EVIDENCE BY ADULTERING THAT EVIDENCE DURING TESTING DESPITE A DEFENSE *GARRIES* REQUEST.

V. THIS COURT SHOULD ORDER A DUBAY HEARING TO ALLOW THE DEVELOPMENT OF EVIDENCE WHICH IS ESSENTIAL TO A CONCLUSION THAT APPELLANT'S COURT MARTIAL WAS TAINTED BY FRAUD, AND THAT APPELLANT'S PANTS CONTAINED EXCULPATORY VALUE WHICH WAS DEGRADED OR DESTROYED BY GOVERNMENT AGENTS.

VI: THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF MURDER.

reply to the Government's response. We have also heard extensive and enlightening oral argument by counsel for appellant and the Government. Based upon our careful consideration of these matters, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We will discuss each of the assigned errors in turn, after first providing our ruling on the collateral matter of appellant's petition for a new trial under Article 73, UCMJ, 10 U.S.C. § 873, and RULE FOR COURTS-MARTIAL 1210, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [*hereinafter* R.C.M.].

The Petition for a New Trial

Based on our resolution of the matters raised by appellant in his briefs and in oral argument before this court, and following our careful consideration of the entire record of proceedings and allied papers, appellant's request for a new trial under Article 73, UCMJ, 10 U.S.C. § 873 is without merit, and is therefore denied. Because of the extreme seriousness of the charged misconduct of which appellant stands convicted, and the resultant sentence to life imprisonment, we have interpreted as generously as possible those materials submitted in support of appellant's

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VII. THE ARTICLE 32 INVESTIGATING OFFICER DEPARTED FROM HIS ROLE OF IMPARTIALITY BY RECOMMENDING TO TRIAL COUNSEL THAT HE HAVE EVIDENCE SEIZED FROM APPELLANT RE-TESTED BY GOVERNMENT WITNESS ENGLERT.

VIII. THE MILITARY JUDGE ERRED IN REFUSING TO SUPPRESS STATEMENTS MADE BY APPELLANT AFTER APPELLANT HAD REQUESTED COUNSEL. (FOOTNOTE OMITTED.)

arguments, despite the objection in the brief by Government counsel. Those matters included an even more detailed attack on the credibility of Mr. Rod Englert, the Government's blood-spatter analyst, than was mustered at trial. We are mindful of the caution exercised by our Air Force brethren in the area of post-trial evidentiary considerations, and concur in their basic reasoning. *United States v. Toro,* 34 M.J. 506, 521 (A.F.C.M.R. 1991), *aff'd on other grounds*, 37 M.J. 313 (C.M.A. 1993) (where the Air Force Court declined to permit supplementation of the record to further contest the credibility of the witnesses at trial), but we specifically find that no fraud upon the court has been demonstrated. Even if the materials proffered by appellant during the appellate process had been available to the triers of fact below, they would not have "probably produced a substantially more favorable result for the accused," and we likewise find that the fraud now alleged is not demonstrated as likely to have had "a substantial contributing effect on a finding of guilty" of the premeditated murder charge. R.C.M. 1210(f)(2)(C), (3). *See also Toro,* 34 M.J. at 521.

We find that the great breadth of litigation emphasis on the luminol testing of the jeans does not by its bulk make it critical to the findings of guilty at issue here. That testing forms but a minuscule part of the case against appellant, a case which we find staggering in its scope and depth. Seldom do we find an accused in possession of goods belonging to a recently deceased person in circumstances similar to those found in this case. Appellant was riding the decedent's prized motorcycle, wearing the decedent's equally prized leather riding suit and helmet -- which the decedent was not known to have willingly loaned to others. Appellant emerges, through the testimony of several witnesses of varying strengths and relationships to the overall picture, as an unrepentant murderer of an acquaintance who enjoyed recounting the act of homicide. In fact, he pointed out to

more than one person that the jeans which form the center of the luminol controversy were worn by him as he killed Corporal Arthurs. While we feel compelled to deal *seriatim* with appellant's assignments of error, we are not moved by his attempts to shift our focus through a straw to ignore the larger realities of the evidence presented at trial against him.

The Luminol Evidence (Assignments I and II)

The Government, in its case-in-chief, proffered the testimony of Mr. Rod Englert as an expert in the area of blood-spatter pattern analysis. Additionally, R.A. Grimsbo, Ph.D., testified concerning his forensic analysis of the jeans seized from appellant and purportedly worn during the murder of Corporal Arthurs, Prosecution Exhibit 9 (hereinafter "jeans"), in conjunction with a request by Mr. Englert. The controversy in this regard centers on their joint use of luminol[7] as the method of enhancing the visibility of otherwise invisible blood in order to attempt to determine if there was a tell-tale spatter pattern. Appellant contends before us both that luminol is not a widely accepted scientific process, and that spatters enhanced with luminol cannot form an appropriate basis for blood-spatter analysis.

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[7] Luminol is a compound 3 aminophthalhydraide (5-amino 2,3-dihydrophthalazine 1, 4 dione), which was first synthesized in the early twentieth century. It's name, luminol, means "producer of light," which aptly describes what occurs if it is sprayed, in a reagent mixture, on areas where occult blood (among other substances) is present. The areas glow with a blue light for 10-15 minutes following spraying, and are generally photographed with time-lapse photography to record the reaction. R.R.J. Crispino, *Luminol and the Crime Scene*, THE PROSECUTOR, Summer, 1991, at 30 n.6 and sources cited therein; *see also* Record at 2212.

He is mistaken and, in fact, his theories fly in the face of evidence the defense team adduced at trial.

The defense expert, Mr. V. Parker Bell, who had extensive background and credentials in blood-spatter analysis, testified at length concerning luminol testing. Among his comments were support for the long-standing use of the procedure, first noted by him in 1968-69 while at college; the fact that he has used the procedure in "hundreds" of tests over the years; and that it is most useful where blood is not visible, perhaps in an instance where a crime laboratory has already reviewed the evidence using an alternative light source and detected nothing. Record at 2474.[8] Mr. Bell reviewed the luminoled jeans, photographed during their testing by Englert and Grimsbo, and responded affirmatively to questions regarding whether they could be "consistent with a person wearing those jeans who had been in proximity to a stabbing," or whether they could be consistent with a great number of other things. Record at 2485. This nearly echoes the conclusions of the Government experts which appellant now decries.

We first note our agreement with the Government that appellant's attempt to rely on an appellate attack on the scientific reliability of luminol as a presumptive test for the presence of blood comes late. At trial he offered no objection to the testimony of Government witnesses on the scientific

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[8] CWO3 Mills, associated with the United States Army Criminal Investigative Laboratory (ISACIL) was also called as a defense witness. He likewise testified that luminol is an acceptable and accurate presumptive test for locating blood stains. Record at 2240, 2258. Ms. Carol Hunter, the defense criminologist, also testified that she used luminol on the jeans, and noted a positive reaction on 27 spots. *Id.* at 3031.

reliability of luminol and, indeed, as we illustrate in detail below, offered his own witnesses who supported the widespread use and acceptance of the technique he now questions. Whether we characterize the state of the case as a waiver or as a forfeiture under the analysis mandated by *United States v. Olano,* 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993), our conclusion is the same: as part of his trial strategy, appellant intentionally declined to object to the scientific basis for luminol use at trial. Since we find no error in the proceedings below, and certainly no "plain error" of constitutional dimension, no relief is warranted. *See generally Olano,* 507 U.S. at 725; Art. 59(a), UCMJ, 10 U.S.C. § 859(a). Our rationale is explained in the analysis below.

No one testified that proximity to a stabbing was the sole possible source of blood on appellant's jeans, but all testified that the patterns on the jeans were "consistent with" such an event. Even CWO3 Mills, who appeared for the defense below, could not state that the spatter pattern in question could not have been from a stabbing. Record at 2223. We note as well that the defense expert, Mr. Bell, referring to the jeans, spoke in terms of "different events to cause the blood to get on there." Record at 2485. He likewise acknowledged that the luminol-enhanced photographs (Prosecution Exhibits 12 - 14) were consistent with what the Government expert earlier stated. In particular, he did not dispute the conclusions that the pocket may have had a bloody hand inserted in it; the right leg may have been in proximity to a stabbing, and that "classical blood spatter patterns" were possibly viewable. *Id.* at 2487-88. Mr. Bell clarified his testimony on redirect examination by stating: "I'm saying that we cannot say that it is inconsistent with any other theory . . . . We would include a stabbing within the field of consistent possibilities. . . ." Record at 2528.

Further, the defense expert "criminalist," Ms. Carol Hunter, testified at length concerning her own use of luminol on the jeans, with results generally consistent with those attained by Dr. Grimsbo. *Id.* at 3028-52.[9] She also testified that the positive results obtained by both she and Dr. Grimsbo with luminol were only "presumptive" for the presence of blood, and that an actual determination that blood was present could be made only following a "confirmatory" test. *Id.* at 3046.

We are therefore unable to ascertain a rational basis of support for the great weight accorded by appellant to the possible "false positive" associated with luminol. Luminol was accepted by all experts who appeared at trial, and the scientific community as a whole, as a viable, routinely used,

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[9] The following dialogue between Ms Hunter and the trial counsel occurred during cross-examination:

"Q: Now, luminol is a screening test for blood?

A: Yes.

Q: And it was positive on these jeans?

A: Yes.

Q: Luminol is a scientifically valid investigatory tool; is that correct?

A: That's correct, yes.

Q: And competent and reasonable forensic scientists would use luminol in situations such as these jeans, where there's [sic] no visible stains; is that true?

A: Well, actually, there are some stains that are visible on the jeans; but **yes, they use them in cases where it's not visible. . .** ." Record at 3045-46. (emphasis added).

and extremely sensitive "presumptive" test for the presence of blood. In this case, not only luminol, but also a second testing process using phenolphthalein, another accepted test for the presence of blood, demonstrated a presumptive presence which corroborated the luminol findings in question by appellant. Record at 2173-75; PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE, VOLUME 1, 532 (2d ed. 1993). Beyond the fact that these two presumptive tests indicated the likely presence of blood, the record reflects statements by appellant which also corroborate that fact. Record at 1078 (testimony of Private Sprenger) and 1290-92 (testimony of Lance Corporal Sheldon).

Were the positive luminol and phenolphthalein presumptive tests alone in evidence, perhaps appellant's argument would be more persuasive. Unfortunately for appellant's position, one of the commonly accepted confirmatory tests, the "crossover electrophoresis" test, was done by Dr. Grimsbo, and it ultimately determined human blood to be present on the jeans. Dr. Grimsbo was, however, unable to *further* specify the type, or match it to a particular human source. *Id.* at 2173-75. *See also* GIANNELLI & IMWINKELRIED, *supra,* at 533-35 (stating that electrophoresis is an accepted confirmatory test, and further indicating that qualified expert testimony that blood is from a human source is generally judicially admissible). We note also that CWO3 Mills, called by the defense in its case-in-chief, also indicated that the crossover electrophoresis test is a valid and widely accepted confirmatory test for the presence of human blood. Record at 2235-36.

We remain convinced that even absent *any* luminol evidence from appellant or the Government - sufficient foundational bases for the admissibility of the jeans are evident under appropriate analyses under MIL. R. EVID.

401-403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). We likewise find no *destruction* of the jeans to any significant extent which precluded appellant's experts from either appropriate review of Government testing or independent testing in their own right. If that were to be found, it would trigger relief under the theory propounded by appellant arising from the dicta found in *United States v. Garries*, 22 M.J. 288, 293 n.6 (C.M.A. 1986). We concur in the military judge's considered resolution of these issues below based on our own independent analysis of the evidence, and find no basis in fact or law to exclude the evidence of luminol testing.

We are not faced with the same dilemma which confronted the court in *United States v. Nimmer,* 43 M.J. 252 (1995), as it contemplated the effect of *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), on admissibility of the testing of a hair follicle for evidence of cocaine use as a matter of scientific evidence in military cases -- a novel scientific issue. *See also United States v. St. Jean,* 45 M.J. 435, 444 (1996), *and United States v. Youngberg,* 43 M.J. 379 (1995). *Daubert* is interpreted by our superior court as a refinement on its earlier pronouncement in *United States v. Gipson,* 24 M.J. 246 (C.M.A. 1987), that the older *Frye* Rule of admissibility of scientific evidence was supplanted in favor of a determination of "scientific validity" as the measure of evidentiary reliability. *Nimmer,* 43 M.J. at 256-57. *See Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 (1923).

Luminol testing is simply not a new or novel scientific evidentiary process, and has been accepted by the single military appellate court to consider it -- even under a post-*Daubert* analysis. *United States v. Hill, 41 M.J. 596, 600-01 (Army Ct. Crim.App. 1994).* We believe that the trial judge in

this instance performed a correct analysis under the Military Rules of Evidence and the existing precedent of our superior court. To adopt appellant's suggestion that *Nimmer* requires an automatic reversal for consideration under *Daubert* criteria seems beyond the pale of reason. We believe, as the Air Force Court of Criminal Appeals recently said, that: "The judge's first responsibility is to filter from the triers of fact 'junk science.'" *United States v. Bush,* 44 M.J. 646, 651-52 (A.F.Ct.Crim.App. 1996)(concerning a *Daubert* analysis of a similar issue to that confronting the *Nimmer* court). We believe the trial judge effectively performed this function, and upon review find his actions should remain undisturbed.

Although we understand that *Nimmer* mandates a remand in those cases still in the appellate chain where a novel scientific evidentiary situation was encountered at trial, we find that the military judge applied the appropriate balancing under MIL. R. EVID. 401-403 in admitting the testimony. There was simply nothing novel involved here. Notwithstanding our firm belief in the rulings below, we are also cognizant of the fact that appellant never once questioned the validity of the luminol process as a scientific process. He shall not now be heard to complain of a failure to apply *Daubert* from the position he now occupies.

We understand that appellant questions specifically the use of luminol as a basis for Mr. Englert's blood-spatter analysis, but find no evidence that would support the exclusion of that testimony since both presumptive tests and the confirmatory test mentioned above indicated the presence of human blood in the areas tested on the jeans. While the defense experts couched their opinions differently, and much effort was devoted to the true terminal velocity of blood droplets, we find no logical disconnect in considering the evidence presented by Mr. Englert. He was qualified only as

a blood-spatter expert, and did not cross the line into analysis of the nature of the substance highlighted by luminol. He was also corroborated by the testing and testimony of the "criminalists," and despite all that may have been said about him, Mr. Englert's unquestioned background and qualifications in the area about which he testified remain. In short, no showing of novelty in the scientific evidence being offered was made, and no more stringent analysis by the trial court was mandated or appropriate. We believe the upshot of Mr. Englert's testimony to be as the Government proffered in its reply brief to this court: "Englert's testimony, reduced to its simplest terms, was that the results of his test and analysis of spots on appellant's jeans was consistent with appellant's statement that he stabbed Arthurs to death. Englert's testimony was circumstantial evidence that tended to corroborate appellant's admissions." Government Brief at 9-10 n.7. By admissions, we mean both his actions in showing the jeans to two different persons, and his statements made during questioning.

We further note that blood-spatter analysis is admissible scientific evidence in military jurisprudence. *United States v. Mustafa,* 22 M.J. 165, 168 (C.M.A. 1986). Thus, if the *Mustafa* admissibility criteria are met, the only remaining issue is that of the weight given the evidence, not its admissibility.

Even assuming, *arguendo*, an element of novelty in this instance, we find no utility in a remand on this matter for a further evidentiary hearing and rulings of law. The blood-spatter analysis in question was but a small part of an overwhelming array of physical and other evidence establishing appellant's guilt of the premeditated murder[10]

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[10] Appellant does not appear to question his convictions on the other offenses before this court. We find each of them, as well,

beyond a reasonable doubt, and both it and the luminol testing served only to corroborate a small portion of appellant's several admissions of guilt. *See, e.g.,* Record at 1291 (Lcpl Sheldon's testimony about being shown what became of the jeans, along with appellant's statements that he had killed Arthurs and that the pants had his blood on them).

We are ultimately convinced that the admission of the luminol test results here, and the subsequent use of them to form the basis of Mr. Englert's blood-spatter analysis was not error. Further, even if error in the admission is found, any such error is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *see also United States v. Miller,* 46 M.J. 63 (1997)(harmless error in the context of an indecent acts case). The luminol issue is, as we have stated earlier, only a very small part of a very large body of overwhelming evidence of guilt.

The Nexus Between Prosecution Exhibit 9 and Appellant (Assignment III)

Appellant asserts that the Government failed to prove a nexus between him and the jeans ultimately introduced at trial as P.E. 9. First, we believe appellant's untimely assertions of the lack of a nexus to him are inconsistent with the posture of the case before us. He offered no objection when the military judge offered him the opportunity to do so early in the proceedings when the exhibit was identified and authenticated by Private Sprenger. Record at 1079; *see also*

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supported by legal and competent evidence beyond a reasonable doubt based upon our own independent analysis under Article 66, UCMJ, 10 U.S.C. § 866.

MIL. R. EVID. 103(a)(1). The evidence clearly supports the fact that these pants were seized with appellant's consent as one of more than 40 evidentiary items at the home of his relatives in the State of Washington contemporaneous with his arrest. Second, when admitted at trial, evidence was also presented that appellant had stated they were the jeans he wore at the time of the murder of Corporal Arthurs. *Id.* at 1078. The jeans corroborated this testimony, and, accordingly, need not be independently admissible. *See* MIL. R. EVID. 104(a), 304(g); *United States v. Duvall,* 44 M.J. 501 (A.F.Ct.Crim.App. 1996). Thus, even if we did not determine any objection to their relevance was waived, we find that sufficient foundational relevance - both legal and factual - existed to sustain their admission as evidence in this case. Appellant's strategy of attempting to demonstrate that the jeans from which he could not dissociate himself might have somehow been contaminated simply fails. The assigned error is without merit.

Destruction of Evidence by Agents of the Government (Assignments IV and V)

A significant amount of time and effort at both the trial and on appeal has been devoted to what appellant terms the "*Garries*" issues. *United States v. Garries* 22 M.J. 288, 293 at n.6 (C.M.A. 1986). The controversy here centers not on the holding in *Garries*, but on the content of footnote 6 to the opinion regarding a future situation in which the testing in question had been done in a military laboratory without notice to the defense. *See* Appellate Exhibit LXXXI. During the pendency of testing by the United States Army Criminal Investigative Laboratory (USACIL), trial defense counsel notified the USACIL that evidence should neither be completely consumed nor destroyed by testing without the opportunity either for a defense expert to participate in the testing, or the segregation of enough of the sample involved

to permit independent defense evaluation. Counsel for appellant did not provide this notification to trial counsel or any other command official when it was submitted to the USACIL.[11] USACIL testing of all proffered items seized from appellant yielded no scientific evidence (though we note that different testing procedures were used there than were later used by the Government and defense experts, as discussed below).

Following the negative evaluation of the jeans for evidence of blood in the fabric by the USACIL, and during the actual trial proceedings, the Government submitted the exhibit for further testing, accomplished by Dr. Grimsbo. Dr. Grimsbo found human blood in the fabric of the jeans. In the opinion of Mr. Englert, the spatter patterns evident on the jeans *were consistent with* blood spatters and with a stabbing event. Dr. Grimsbo testified that he found evidence of human blood, but could not confirm the type as being either that of the victim or appellant. Record at 2175.

The testing done by Dr. Grimsbo differed from that done by the USACIL, in that he used luminol testing to luminesce the clothing,[12] and recorded the results with time-lapse

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[11] While we can point to no specific requirement for notification of Government counsel under such circumstances, we commend the logic of such notification to defense counsel, in the hope that, as officers of the court, they can appreciate the fact that such notification is "in the interests of justice" overall.

[12] Luminol, as described in an earlier footnote, is considered a "presumptive" test for the presence of blood - that is a test which determines only that blood (human or animal) may be present, and which must be confirmed as to whether, if blood, it is human or animal, by other testing. Luminol is one of several screening or "presumptive" tests which are currently widely accepted and are in use in the forensic science community. GIANNELLI &

photography, which was also made part of the Record. Prosecution Exhibits 12, 13, and 14. Record at 2171-75. This differed from the USACIL testing, which consisted of visual observation of the clothing and subjection of it to an "alternative light source."[13] Record at 2210-11. No chemical or microscopic screening tests were performed by USACIL personnel, and no obvious stains were noted then. *Id.* at 2234, 2243-44. CWO3 Mills indicated, in response to a question by Trial Counsel, that his testimony was "based entirely" on his confidence in the alternative light source "revealing the presence of all types of body fluid." *Id.* at 2249.

Luminoling of material can establish unequivocally that no blood is present. GIANNELLI & IMWINKELRIED, *supra*, at 532. The test is based on the catalytic activity of the heme in hemoglobin, which triggers an oxidation reaction leading to a color change. *Id.*; Record at 2475 (testimony by the defense expert, v. Parker Bell). Luminol is one of the most common tests of this type. *Id.* Once the "presumptive" presence of blood is indicated, the next step in determining the actual nature of the substance is through use of a "confirmatory" test to discern whether the substance is actually blood, and, if so, human blood in particular. Professors Gianelli and Imwinkelried indicate that among the most popular methods is the "Takayama" crystal test, which is based on a reaction between the crystal and the heme portion of the red blood cell. *Id.* at 533. The crystal confirmatory tests are less sensitive than the catalytic tests, but are more specific - with false positive not generally

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IMWINKELRIED, *supra*, at 532.

[13] The "alternative light source" is essentially a laser light source to highlight the presence of any foreign substance not otherwise visible to the naked eye under normal light conditions.

encountered. *Id.* These authors further observe that testimony from medical technologists "about preliminary ["presumptive"] tests, confirmatory tests, *or a combination of such tests* . . . is routinely admissible." *Id.* (Emphasis added).

We are left with the fact that, for whatever reason, appellant's trial defense counsel chose not to notify the prosecution team of their *Garries* request to the USACIL, which might leave open the question of induced or invited error. *United States v. Grunden,* 2 M.J. 116, 124-25 (C.M.A. 1977). We find this lack of notice to be irrelevant to our resolution of this matter, however, since we conclude that the testing by Dr. Grimsbo did not destroy or degrade the available evidentiary materials in the jeans to any significant extent. The defense expert, Ms. Hunter, testified that she was able to test the jeans, and that, in fact, she got positive reactions for blood on the exhibit. Her testimony was far less convoluted to us as it appear to have been to appellant, in that she testified not that the luminol testing had either destroyed or significantly altered the substances on the jeans, but that her "control" testing gave results which did not permit her to make a positive identification of any specific description of the blood found by her. Further, and in our opinion of greater importance, is the fact that luminol testing has been shown to have no effect on a subsequent phenolphthalein test such as the one noted as the later confirmatory testing procedure used in this case. Dale. L. Laux, M.S., *Effects of Luminol on the Subsequent Analysis of Bloodstains,* 36 J. FORENSIC SCI. 1512, 1513 (1991).

We are struck by the fact that the evil sought to be remedied in *Garries* situations is the consumption of destructible evidence without sufficient opportunity for independent defense expert evaluation. Even assuming,

arguendo, some degradation from the luminol testing as it relates to further defense-sponsored testing, the contemporaneous recordation of the luminescence through photography -- which remained available at all times for independent evaluation by defense experts -- appears to detract from any claim that an adequate opportunity for scientific evaluation by the defense was foreclosed. Appellant's expert was provided the jeans, and was able to test the results proffered by Government experts and evaluate their recorded previous test results as well. Both Government and defense expert evidence was admitted as matters of legal relevance, and both were considered by the trier-of-fact in arriving at their conclusions. Appellant seemed to argue at trial that *Garries* requires a lock-step process of notice to the defense, the failure of which will invalidate any subsequent testing, even where no harm befell the evidence or the defense was not otherwise disadvantaged. Record at 1452-56; *Garries,* 22 M.J. at 290-93. We are unwilling to impose such a rule.

Factual Insufficiency of Evidence on the Premeditated Murder Charge (Assignment VI)

In exercising our statutory obligation under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we are convinced of appellant's guilt beyond a reasonable doubt on not only the premeditated murder charge, but also on all other charges before the court. We arrive at our conclusion by testing both the legal and factual sufficiency of the evidence.

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781

(1979)). When applying this test we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty,* 38 M.J. 131, 132 (C.M.A. 1993)(quoting *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991)). In appellant's case, we so find.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of . . . [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner,* 25 M.J. at 325. We are.

The Actions of the Investigating Officer (Assignment VII)

We are deeply concerned by the actions of Major N., who served as the Article 32, UCMJ, 10 U.S.C. § 832 pretrial investigating officer, following the issuance of his report and the referral of the case to trial. We are cognizant that his assigned role in the case had been completed prior to the time of his dialogue with the trial counsel[14] sometime in the latter part of December, 1992. At that time, it appears from the record that he recommended to trial counsel that appellant's clothing be tested for the presence of blood by Mr. Englert. Our concern is specifically that, despite what

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[14] The Report of Investigation was completed on 4 August 1992 recommending trial by general court-martial for premeditated murder and the other offenses of which appellant was ultimately convicted. The staff judge advocate to the convening authority recommended referral as a capital case in his advice under Article 34, UCMJ, *10 U.S.C. § 834,* signed on 20 August 1992, and the convening authority referred the case as capital on 21 August 1992.

might have been a very neutral and well-meaning motivation to provide possible resource information to assist in the case, provision of information solely to the assigned prosecutor, with no simultaneous, or even serial, notification to the defense, makes the act *appear*, at least, as one of an impermissible, adjunct trial counsel. R.C.M. 405(d); Art. 27(a)(2), UCMJ, 10 U.S.C. § 827(a)(2). We must apply a two-part test here, as articulated by the Court of Military Appeals (now the Court of Appeals for the Armed Forces) in *United States v. Payne,* 3 M.J. 354 (C.M.A. 1977). We first must determine whether a departure from the statutory role occurred, and, if so, if it resulted in prejudice to appellant. *Id.* at *357.* We find that the actions complained of do constitute a departure from a permissible role, and are inconsistent with the quasi-judicial obligations of the pretrial investigating officer.

We must next test the error for prejudice to appellant. We note that the error could not have worked any mischief in the referral process, and we are convinced beyond a reasonable doubt that no prejudice to the substantial rights of the accused arose in the trial of the case because of it. Trial counsel is not alleged to have further interacted with the pretrial investigating officer beyond the interaction described above, and we cannot speculate as to any further departure from the statutory roles of either.[15]

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[15] Government Counsel proffer that this issue was waived by appellant's failure to raise it prior to entry of pleas. We decline to do so in this instance because on 22 December 1992, at the time pleas were entered, the actions here in question had either not yet taken place, or if they had taken place cannot be determined to have been within the trial defense team's spectrum of awareness. Government Brief at 30-31; Record at 205.

Although we find no prejudice warranting relief in this instance because of the overwhelming evidence of guilt in the record, even without any development of this issue following the discussion in question, those who act as pretrial investigating officers under Article 32, UCMJ, 10 U.S.C. § 832, would do well to ensure that they remain scrupulously attentive to the requirement that they play no subsequent role in the administration of the case.[16]

Refusal by the Military Judge to Suppress Pretrial Statements (Assignment VIII)

The final assignment of error submitted to us by appellant's counsel[17] alleges error in the refusal by the military judge to suppress the pretrial statements made to Detectives Simica and Gordon of the San Diego Sheriff's Department, for all purposes, including impeachment, on the grounds that they were involuntary. While the Government's argument that the issue was waived by the failure of appellant to take the stand at trial, we will evaluate this issue of importance to appellant on its merits. *See* Government Brief at 31-32.

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[16] One danger in such actions which is reasonably foreseeable would be an order issued by the military judge at trial to re-open the pretrial investigation. Clearly, under the circumstances at bar here, recusal would be mandated. This situation analogizes aptly to the "Bridging the gap" cases which arose earlier in some Army cases when trial judges provided post-trial "practice pointers" to counsel prior to the cases being finalized, at times in an *ex parte* manner such as we note here occurred. *See, e.g., United States v. Copening,* 34 M.J. 28, 29 n.* (C.M.A. 1992), and cases cited therein.

[17] This issue is raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

Our review of the evidence available on this issue leads us to several conclusions. First, we find that appellant was indeed in a "custodial interrogation" situation as defined in *Miranda-Tempia. Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); *United States v. Tempia,* 16 C.M.A. 629, 37 C.M.R. 249 (1967). He had been arrested by two San Diego County Detectives near his mother's home in the vicinity of Seattle, Washington, and warned of his right to remain silent and to consult with an attorney. He initially spoke with the detectives, but after a break indicated a desire to speak with an attorney. The dialogue continued however, despite the mandate of the Supreme Court that it cease under these circumstances. *Edwards v. Arizona,* 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981).

We find that, confronted with this scenario, and upon an appropriate motion *in limine* proffered by trial defense counsel, the military judge ruled that all statements taken following the request for counsel would be inadmissible in the Government's case on the merits. He concurrently ruled, as well, that the statements would be admissible as impeachment if the accused testified. We find his decision to be fully consistent with MIL. R. EVID. 304(b)(1), *Harris v. New York,* 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971), and *United States v. Williams,* 23 M.J. 362 (C.M.A. 1987). We find no evidence that the free and rational choice of appellant was somehow overborne, or that the statements in question were the product of coercion or other unlawful influence. We specifically find that the trustworthiness of the statements in question has not been brought into question. *See Mincey v. Arizona,* 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978). Although we are generally inclined to give deference to the essential findings of the military judge in

this area, we are not bound by them. Art. 66, UCMJ, 10 U.S.C. § 866(c); *United States v. Bubonics,* 40 M.J. 734, 738 (N.M.C.M.R. 1994)(citing *United States v. Jones,* 34 M.J. 899, 905 (N.M.C.M.R. 1992). We have conducted a *de novo* review, and conclude that the military judge's trial ruling concerning admissibility of appellant's pretrial statements as impeachment evidence was correct.

Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

K.T. SEFTON

Senior Judge McLAUGHLIN and Judge WYNNE concur.

P.J. McLAUGHLIN LARRY D. WYNNE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 00-061
Thursday, January 06, 2000

ORDERS GRANTING PETITION FOR REVIEW

No. 99-0944/AR. U.S. v. Jeffery L. AYERS, Sr. CCA 9701847. Review granted on the following issues:

I. WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THAT APPELLANT COMMITTED INDECENT ASSAULTS AGAINST PFC HILL.

II. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT ON THE MISTAKE OF FACT DEFENSE REGARDING CHARGE III, SPECIFICATIONS 2 AND 3 (INDECENT ASSAULT).

III. WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THAT CASCOM&FL REGULATION 600-27 WAS A LAWFUL GENERAL REGULATION.

IV. WHETHER THE RECORD OF TRIAL IS NOT PROPERLY AUTHENTICATED.

V. WHETHER APPELLANT WAS PREJUDICED BY THE APPEARANCE OF UNLAWFUL COMMAND INFLUENCE WHERE THE

CONVENING AUTHORITY WHO REFERRED THE CHARGES AND THE PANEL MEMBERS

WHO SAT ON APPELLANT'S COURT-MARTIAL WERE EXPOSED TO PREJUDICIAL AND INFLAMMATORY PRETRIAL PUBLICITY CONCERNING COMMENTS MADE BY THE SECRETARY OF DEFENSE, THE SECRETARY OF THE ARMY, THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE CHIEF OF STAFF OF THE ARMY, THE TRADOC COMMANDER AND OTHER HIGH-RANKING OFFICIALS WITH THE MILITARY CONCERNING THE CLASS OF CASES UNDER WHICH APPELLANT FELL.

PETITIONS FOR RECONSIDERATION DENIED

No. 98-0037/MC. U.S. v. Kevin M. HOLT. CCA 94-2003.
No. 98-0434/MC. U.S. v. Kasie L. DAWSON. CCA 96-2394.

INTERLOCUTORY ORDERS

No. 00-0074/NA. U.S. v. Donnie M. BOLERJACK. CCA 98-1500. Appellee's motion to extend time to file answer to supplement to petition for grant of review granted to February 2, 2000.
No. 99-0399/MC. U.S. v. Jose D. AVILA, Jr. CCA 97-0776. Appellant's motion to attach excerpts from the special court-martial of *United States v. Spores* denied.